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IN THE

# Supreme Court of the United States

October Term, 1961

No. 454

BERNARD SILBER,

*Petitioner,*

v.

UNITED STATES OF AMERICA.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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IN THE

# Supreme Court of the United States

**October Term, 1961**

**No.**

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BERNARD SILBER,

*Petitioner,*

v.

UNITED STATES OF AMERICA.

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered in the above case on June 30, 1961.

### Opinions Below

The District Court for the District of Columbia rendered no opinion. The opinion of the Court of Appeals has not been officially reported, and is annexed hereto as Exhibit A. The judgment of the Court of Appeals is annexed as Exhibit B.

### Jurisdiction

The judgment of the Court of Appeals was entered on June 30, 1961. Rehearing was denied on August 1, 1961. An extension of time to September 30, 1961 for the filing of this Petition was secured from a Justice of this Court on August 16, 1961. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

## Questions Presented

1. Were the questions which petitioner refused to answer pertinent to the subject under inquiry by the subcommittee?

2. Was there probable cause sufficient to justify the issuance of a subpoena to the petitioner?

3. Did the public interest involved in securing answers to the questions here at issue outweigh petitioner's interest in the exercise of his rights under the First Amendment?

4. Did the District Court err in refusing to permit the introduction of testimony relating to the relative weight of the public and private interests affected by the investigation of the subcommittee?

5. Should the indictment have been dismissed because of the presence of government employees on the Grand Jury?

6. Was the statute under which petitioner was convicted unconstitutionally vague?

7. Was the investigation being carried on by the subcommittee pursuant to a bona fide legislative purpose?

8. Was the investigation carried on by the subcommittee permissible under the First Amendment to the Constitution?

9. Was the resolution establishing the Committee invalid for vagueness?

10. Was the inquiry conducted by the subcommittee within the scope of the resolution creating the Committee?

## Constitutional Provisions and Statutes Involved

The constitutional provisions involved are the First, Fifth and Sixth Amendments to the Constitution.

The statute involved is 2 U. S. C. § 192, which reads as follows:

> "Refusal of witness to testify
>
> "Every person who having been summoned as a witness by the authority of either House or Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month or more than twelve months."

## Statement

Petitioner was indicted under 2 U. S. C. § 192 for contempt of Congress on four counts (J.A. 2-4). Count two was dismissed before trial (J.A. 10). Petitioner waived a jury and, after trial, was convicted and sentenced to four months' imprisonment and a fine of $100 (J.A. 10-11, 97).

Petitioner was summoned to appear before a subcommittee of the House Committee on Un-American Activities (hereinafter referred to as the "Committee") by subpoena issued June 21, 1957, five days after the decision of this Court in *Watkins* v. *United States*, 354 U. S. 178 (J.A. 14). He appeared on August 2, 1957 and testified, under questioning by Committee counsel, that he was at that time employed by Western Union Telegraph Company, and that he had been so employed for 41 years. In the course of his work he had access to "Government coded messages," but he had no way of telling whether or not they were security

messages (J.A. 24, 25). He said that he had been a member of the Communist Party "for a brief period" in about 1948 but was no longer a member (J.A. 26). He drifted away almost immediately and was never active (J.A. 26). He attended meetings infrequently (J.A. 33, 34).

He was then asked what group of the Communist Party he was a member of. He refused to answer on grounds of lack of jurisdiction of the Committee, his rights under the First Amendment, the vagueness of the resolution setting up the Committee and lack of pertinency. He relied heavily on the decision of the Supreme Court in the *Watkins* case (J.A. 26, 67-71).

The following colloquy immediately ensued:

> "Mr. Scherer: You refused to answer Mr. Arens' question as to the person who recruited you in the Communist Party.[1] You refused to identify that person.
>
> Now, without identifying him or telling us his name, is that person still a member of the Communist Party today?
>
> (The witness confers with his counsel.)
>
> Mr. Scherer: As a communications worker?
>
> Mr. Silber: To the best of my knowledge he is no longer in the industry.
>
> Mr. Scherer: Was he a communications worker?" (J.A. 27, 28).

Petitioner's refusal to answer this last question forms the basis of Count 1.

Counsel for the Committee then stated that if the person who enlisted petitioner into the Communist Party was in the communications field, "that person undoubtedly would have some information of use to the Committee." (J.A. 28).

After further questioning not here at issue, the following colloquy took place:

> "Mr. Scherer: What union do you belong to?

[1] No such question had been asked by Mr. Arens.

Mr. Silber: The American Communication Association.

Mr. Scherer: Were any of the officers of your union members of the Communist Party at the time you were a member of the Communist Party?

Mr. Silber: I must decline to answer that, sir.

Mr. Scherer: I ask that you direct the witness to answer the question.

Mr. Doyle: I direct you to answer the question.

Mr. Silber: I must decline on all the grounds previously stated.

Mr. Scherer: Were any of the present officers of your union members of the Communist Party at the time you were in the party?

Mr. Silber: I must decline for the same reasons. I must decline to answer.

Mr. Scherer: I ask that you direct the witness to answer the question.

Mr. Doyle: I direct you to answer the question.

Mr. Silber: I must decline to answer.

Mr. Scherer: And those questions were asked you for the same reasons that Mr. Arens, our counsel, gave you for asking the other questions. They are pertinent for the same reasons that he advanced." (J.A. 34)

These two refusals to answer constitute the basis of Counts 3 and 4.

The witness was not asked any questions concerning his own activities in the Communist Party.

Petitioner was indicted on or about August 4, 1958. He moved to dismiss the indictment and for a hearing on the qualifications of the grand jurors, filing an offer of proof in connection with the latter motion (J.A. 3-9). The motions were denied, except that Count 2 was dismissed (J.A. 10).

At the trial the only witness for the prosecution was counsel for the Committee, Mr. Arens. He testified that the Committee caused a subpoena to be issued to petitioner because the Committee had information "that Mr. Silber had been a member of the Communist Party engaged in the communications field" (J.A. 15).

On cross-examination Mr. Arens testified that he had previously been special counsel to the Internal Security Subcommittee of the Senate Committee on the Judiciary and that in 1951 he had conducted an investigation into communism in the communications industry, particularly into the American Communications Association. This was the union of which petitioner was a member and which was the subject of Counts 3 and 4 of the indictment. The witness recalled a "synopsis of some kind" resulting from that investigation (J.A. 38). He also recollected hearings in 1954.[2]

The witness further testified that the information he received from the Committee files and from Committee investigators was sufficient in his mind to justify the issuance of a subpoena to the petitioner. This testimony will be considered in more detail below.

After the Government rested, an offer of proof was made by the petitioner in support of his contention that his individual interest and the public interest in protecting his rights of free speech and assembly and his right of privacy overbalanced the public interest in securing answers to the questions put to him (J.A. 94-6). The offer was rejected, and petitioner rested (J.A. 96). The offer of proof appears in the record at J.A. 97-118. The court denied a motion for direction of acquittal and found the petitioner guilty on all three counts (J.A. 96). He was sentenced to imprisonment for a term of four months and to pay a fine of $100. He was continued at large on bail of $1,000.

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[2] In fact, extensive hearings, accompanied by a "Progress Report" had been issued by the Senate Committee in 1951 and further hearings with a "Supplemental Report" had been issued in 1952 (Hearings before the Subcommittee to Investigate the Administration of the Internal Security Act of the Senate Committee on the Judiciary, 82nd Cong., 1st Sess., May 14-June 14, 1951 and Supplemental Hearings, 82nd Cong., 2nd Sess., January 22, 1952, both entitled "Subversive Infiltration in the Telegraph Industry"). The 1954 hearings, also conducted by Mr. Arens, are dated December, 1953 and March, 1954, 83rd Cong., 2nd Sess., and are entitled "Subversive Influence in Certain Labor Organizations".

## Reasons for Granting the Writ

1. This case presents directly for decision the question which this Court declined to consider in *Barenblatt* v. *United States*, 360 U. S. 109, namely, whether a witness may be held for contempt for refusal to answer questions relating to the names of other persons who are associated with him in political activity under investigation by the Committee. Count 3 in *Barenblatt* related to the following question:

> "Now you have stated that you knew Francis Crowley. Did you know Francis Crowley as a member of the Communist Party?"

The Court stated, at page 115:

> "As we conceive the ultimate issue in this case to be whether petitioner could properly be convicted of contempt for refusing to answer questions relating to his participation in or knowledge of alleged Communist Party activities at educational institutions in this country, we find it unnecessary to consider the validity of his conviction under the Third and Fifth counts, the only ones involving questions which on their face do not directly relate to such participation and knowledge."

The three questions at issue here likewise do not relate to petitioner's "participation in or knowledge of alleged Communist Party activities", but rather to the identity of other persons in the Party.

It will, we believe, be admitted by the Government that the three questions involved, although not directly requiring the names of persons who were members of the Communist Party with petitioner, were preliminaries to such questions. Mr. Arens so stated in arguing the pertinency of the first question (J.A. 28). Congressman Scherer repeated this explanation of pertinency in relation to the third and fourth questions (J.A. 34), and the Court below accepted the fact that the questions were designed to get at the identity of other persons (*infra*, p. 21).

The witness was, it will be noted, quite willing to answer all questions concerning his own participation in and knowledge of the activities of the Communist Party, though the Committee showed a lack of interest in such activities and asked no questions concerning them.

In effect, therefore, the questions put to petitioner really constituted a discovery proceeding. The Committee was using him, not to get evidence concerning activities of the Communist Party but to get the names of other persons so that they in turn could be questioned.

We do not understand that the Committee has any such authority: indeed, the questions here asked were in aid of the "exposure" purposes of the Committee and not of its legislative purpose. The Committee had received scores of names from other witnesses testifying at the same hearing. (Hearings before the Committee, 85th Cong. 1st Sess., entitled "Investigation of Communist Penetration of Communications Facilities, Part I") to say nothing of the hundreds of names secured in the 1951, 1952 and 1954 hearings. Few of these persons were in fact called by the Committee; the fact that their names were made public was sufficient for Committee purposes.

This Court has recognized that in this area, in which a close balance exists between the individual and public rights involved, the issue of pertinency should be scrutinized with great care. Cf. *Watkins* v. *United States*, 354 U. S. 178; *Deutch* v. *United States*, 367 U. S. 456. The questions here under consideration cannot bear such scrutiny.

Furthermore, it must be noted that petitioner had not been a member of the Communist Party for about nine years prior to his testimony. Testimony as remote as any the petitioner was required to give likewise fails to meet the test of pertinency.

Finally, a consideration of the testimony relating to the specific counts on which petitioner was convicted would

call for a reversal. The first count involves a question which was answered sufficiently prior to the refusal to answer. It will be noted (J.A. 27, 28) that Mr. Scherer asked, "Is that person still a member of the Communist Party today * * * as a communications worker?" The petitioner answered "To the best of my knowledge he is no longer in the industry." He was then asked, "Was he a communications worker?" His refusal to answer did not deprive Congress of information; that information had been fully supplied by the previous answer.

With respect to Counts 3 and 4 it will be noted that no explanation of pertinency was made until *after* the witness had been directed to answer the questions and he had refused to do so (J.A. 34). The witness was never given an opportunity to make answer after pertinency had been pointed out to him.

2. There was no probable cause to issue a subpoena to petitioner. This Court in *Barenblatt* said, at page 134:

> "Nor did petitioner's appearance as a witness follow from indiscriminate dragnet procedures, lacking in probable cause for belief that he possessed information which might be helpful to the Subcommittee."

The Court, in a footnote, referred to sworn testimony given before the Committee identifying Barenblatt as a member of the Communist Party, and to "evidence" in its files to the same effect.

See also *Wilkinson* v. *United States*, 365 U. S. 399, at 412, where this Court again refers to sworn direct testimony as constituting "probable cause".

Here the only "probable cause" for belief that the petitioner had information which might be helpful to the Committee consisted of: (1) a seventeen year old newspaper report that members of an opposing political faction

had called petitioner, and ninety-eight other persons, "reds" in the course of a primary fight (J.A. 87); (2) a hearsay report that unidentified persons had said that petitioner and his son were members of the Communist Party (J.A. 89, 90), and (3) an assertion that many years ago petitioner had signed a Communist Party nominating petition (J.A. 87).

The term "probable cause" is no stranger to the law, and its meaning has often been defined. Thus the Court said in *Contee* v. *United States*, 215 F. 2d 324, 327 (C. A. D. C. 1954):

> "An uncorroborated tip of an informer, whose identity and reliability are both unknown, does not constitute probable cause to make an arrest."

In *Cervantes* v. *United States*, 263 F. 2d 800, at 803 (C. A. 9, 1959), the Court noted:

> "* * * probable cause means more than a large suspicion."

And in *United States* v. *Castle*, 138 F. Supp. 436 (D. C. D. C. 1955), Judge Youngdahl, in ruling evidence inadmissible, said:

> "An arrest or warrant for an arrest may not be based upon the suspicion or opinion of some person, unsupported by personal knowledge of the facts, and a warrant to search a private home may not rest upon a mere statement of suspicion without the disclosure of supporting facts and circumstances to justify the suspicion."

It is also clear that the burden of establishing probable cause is on the Government. *Wrightson* v. *United States*, 222 F. 2d 556 (1955); *Cervantes* v. *United States*, *supra*.

If, as this Court has held, probable cause is necessary for the issuance of a subpoena, it is clear that no probable

cause existed here. Unlike the other cases which have come before this Court we have here no sworn testimony but only rumors and gossip, originating with persons who, so far as we know, were not even known to the Committee. Added to this is the fact that petitioner, along with thousands of others, is alleged to have once signed a Communist Party nominating petition.[3]

3. In the *Barenblatt* case this Court assumed the difficult burden of balancing "the competing private and public interests at stake in the particular circumstances shown." 360 U. S. at 126.

So long as the *Barenblatt* rule remains in effect, a court trying a case affecting First Amendment rights must likewise balance the competing private and public interests at stake in the "particular circumstances" of each case. Every defendant in a criminal case is entitled to a trial on the record in his own case and not on the basis of findings made in some other case.

We do not understand the holding of the Court of Appeals (*infra*, p. 21) that the "balancing" is a "a matter of law for decision by the Court." Certainly it is facts which must be balanced; otherwise the balancing doctrine enunciated by the Court is merely a way of denying constitutional rights whenever Congress feels that national security is at stake. Some clarification by this Court is necessary if the lower courts, and counsel trying these cases, are to apply the balancing doctrine in this and other cases involving the First Amendment.

It is clear, of course, that this Court does in fact balance interests separately in each case and that such balance is

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[3] There is no evidence in the record as to when such petition was signed. The most recent date on which appellant could have signed a nominating petition for Davis was 1946, when Davis ran for Attorney General of New York State on the Communist Party ticket. A nominating petition for that office would require 12,000 signatures. Amter had run for governor in 1942 and for member of the City Council in 1937 and 1939.

based on a factual analysis. In *NAACP* v. *Alabama*, 357 U. S. 449; *Bates* v. *Little Rock*, 361 U. S. 516; *Shelton* v. *Tucker*, 364 U. S. 479 and *Louisiana* v. *NAACP*, 366 U. S. 293, this Court considered the facts in each case and after balancing them came to the conclusion that the rights of the individuals involved outweighed the rights of the states in enforcing legislation which impinged on First and Fourteenth Amendment rights. This offers no unusual or unprecedented problems; this Court has long followed a similar process in considering the constitutionality of legislation which sought to regulate commercial enterprises. *Muller* v. *Oregon*, 208 U. S. 412; *Nebbia* v. *New York*, 291 U. S. 502.

It is clear that the interest of the Committee in securing the answers to the question it put to petitioner was minuscule in the circumstances presented in this case and can hardly be said to outweigh the substantial rights of petitioner which were being infringed, to say nothing of the rights of the public in the free exercise of political freedoms. As is noted above, this is not the first time there has been a congressional investigation of the communications industry. In the 1951, 1952 and 1954 hearings about a hundred alleged Communists had been named. (See Hearings cited *supra*, at p. 6.) Is petitioner to lose his basic rights because he refused to name two or three more?

Petitioner's membership in the Party had been remote in time and casual in substance. There is nothing to suggest that he could have named anyone whose name had not been submitted to the Committee, or who would come forward to add anything substantial to the material already submitted to the Congress on this and other occasions.

Against this we must set the constitutional rights of petitioner—constitutional rights which the Courts generally agree are of the utmost importance. See *Barenblatt* at page 112 and *Watkins* at page 197. The issue between the majority and minority members of the Court in *Barenblatt*

was the circumstances under which those First Amendment rights could be invaded. We submit that under the circumstances shown here the invasion is not justified by any overwhelming or even important public interest which required the petitioner to surrender those rights in order to add a couple of names of alleged Communists to the many names already in the possession of the Committee.

4. The trial court erred in excluding the proffered testimony of Professor Thomas I. Emerson on the issue of the competing public and private interests at stake.

In *Barenblatt*, the Court (at p. 128, *et seq.*) made certain "findings" with respect to the alleged threat of Communism to the United States. We assume that those findings were made on the basis of the record in that case, together with additional facts of which the Court took judicial notice. In the instant case, there are no facts in the record on the basis of which any finding could be made that Communism constitutes a sufficient threat to the United States to justify the interference with First Amendment rights which, it must be generally conceded, existed here. So we must assume that the District Court took judicial notice of the facts it was required to find under the *Barenblatt* decision, namely, that in balancing the competing private and public interests at take in these circumstances, the public interests outweighed the private.

The doctrine of judicial notice can never constitutionally be utilized to bar evidence seeking to contradict "common knowledge." Testimony is always admissible on any factual issue before the Court. As the Supreme Court said in *Ohio Bell Telephone Co.* v. *The Public Utilities Commission of Ohio*, 301 U. S. 292, 301:

> "Moreover, notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence, Wigmore, Evidence § 2567; 1 Greenleaf,

> Evidence, 16 Ed., p. 18. 'It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable.' *Ibid.*"

To the same effect, see *Grand Opera Co.* v. *Twentieth Century Fox Film Corp.*, 235 F. 2d 303, 307 (C. A. 7, 1956); *In Re Bowling Green Milling Co.*, 132 F. 2d 279 (C. C. A. 6, 1942); *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (C. C. A. 2, 1945).

Petitioner contends that if "competing private and public interests at stake" in the circumstances here are balanced, the private interests far outweigh the public. To establish his contention on that point, Professor Thomas I. Emerson, Professor Law at Yale University, was offered as a witness. His testimony was reduced to writing and was submitted to the Court at the trial for a ruling as to admissibility. The Court refused to accept the testimony, but the offer of proof is a part of the record and appears at J.A. 97-118.

We shall not summarize that testimony here except to say that after qualifying himself as an expert who has made an extensive study of the subject (J.A. 100-102), Professor Emerson came to the conclusion, on the basis of facts set forth in the record "that the interests of the Government in obtaining answers to the questions put to this defendant as an aid in developing further legislation to protect internal security are substantially outweighed by the interests of the individual in freedom of speech or silence, as he may prefer, and by the interests of the community in maintaining freedom of political expression and other conditions essential to maintaining an open society" (J.A. 117-118).

We shall not here consider the merits of Professor Emerson's testimony or its weight but only its admissibility. It seems clear that if the balancing concept established by the Court in the *Barenblatt*, *NAACP*, *Bates* and *Shelton*

cases, *supra*, is to be applied in a way that will protect the constitutional liberties of petitioner and others similarly situated, testimony on the subject must be admissible.

5. Prior to trial, petitioner moved for an opportunity for a hearing on the qualification of the Grand Jurors, pointing out that fifteen members of the Jury that indicted petitioner were government employees (J.A. 5). The motion was denied.

In *Frazier* v. *United States*, 335 U. S. 497, this Court, in a five to four decision, held that the mere fact that members of a Jury were government employees would not disqualify them, but that they could be challenged for actual bias. In *Dennis* v. *United States*, 339 U. S. 162, this Court rejected the argument that the loyalty procedures of the Government in that past few years *ipso facto* created bias and fear in the minds of any government employees acting as a juryman in a case involving a Communist. The Court held that actual bias had to be shown and said "The way is open in every case to raise a contention of bias from the realm of speculation to the realm of fact." (339 U. S. at 168.) In *Cammer* v. *United States*, 350 U. S. 399, when an attorney sought to investigate actual bias, he was convicted of contempt and while the conviction was reversed in this Court, his experiences hardly offer encouragement to counsel who would make a direct and private investigation of factual bias.

The only way which seems to remain to "raise a contention of bias from the realm of speculation to the realm of fact" would seem to be the procedure sought to be followed in this case. If the District Court was right in denying petitioner's motion, the promise of this Court in *Dennis* is an empty one and the fears expressed by the minority of the Court in the *Frazier* case will be well justified.

This issue has been implicit in a number of similar cases heretofore before this Court, but they have not been reached. *Quinn* v. *United States*, 349 U. S. 155; *Watkins*

v. *United States*, 354 U. S. 178; cf. *Gold* v. *United States*, 352 U. S. 985. It is, we believe, raised by the petitioners in *Shelton*, *Liveright*, *Price and Gojack*, now awaiting argument in this Court.

6. In the court below petitioner urged that the activities of the Committee violated his First Amendment rights, that the resolution creating the Committee was unconstitutionally vague and that the Committee was not engaged in a *bona fide* legislative purpose. This Court rejected those arguments in the *Barenblatt*, *Wilkinson* and *Braden* cases and they will not be repeated here, since there is little that we could add to the petitioners' briefs and the eloquent dissenting opinions in those cases. Those contentions, however, are not abandoned and petitioner hopes that this Court will once again review those issues and correct what we conceive to be a serious impairment of the constitutional rights of petitioner and all others in similar positions.

## CONCLUSION

**The petition for a writ of certiorari should be granted.**

Respectfully submitted,

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September 25, 1961.

# Appendix A

**(Opinion of United States Court of Appeals, for the District of Columbia Circuit)**

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,779

BERNARD SILBER,

*Appellant*

v.

UNITED STATES OF AMERICA,

*Appellee*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided June 30, 1961

MR. VICTOR RABINOWITZ, of the bar of the Court of Appeals of New York, *pro hac vice,* by special leave of court, with whom MR. DAVID REIN was on the brief, for appellant.

MR. WILLIAM HITZ, Assistant United States Attorney, with whom MESSRS. OLIVER GASCH, United States Attorney at the time of argument, CARL W. BELCHER, Assistant United States Attorney at the time of argument, and MISS DORIS SPANGENBURG, Assistant United States Attorney, were on the brief, for appellee.

Before MR. JUSTICE REED, retired,* BAZELON and BASTIAN, Circuit Judges.

* Sitting by designation pursuant to Sec. 294 (a), Title 28, U. S. Code.

BASTIAN, *Circuit Judge*: This case is a companion to *Grumman* v. *United States*, No. 15,747, decided today. Appellant, like Grumman, was called to testify before a subcommittee of the House Committee on Un-American Activities during a series of hearings on communist infiltration into the communications industry.

Appellant was called on August 2, 1957. At the commencement of proceedings on that day, and in the presence of appellant, the subcommittee chairman, Mr. Clyde Doyle, made the following statement:

> "This morning's hearings are a continuation of previous hearings started on July 17, 1957, this being a continuation of a series of hearings in the communications industry in the United States, namely, the position and influence held by members of the Communist Party and organization dedicated to the Communist objectives in that field of communications industry, principally.
>
> • • •
>
> [Mr. Doyle then read into the record the resolution of the full committee authorizing the hearings currently in progress. The language of that resolution is quoted in Grumman.]
>
> • • •
>
> "[In] these hearings, the second of a series on this general subject, the committee hopes to obtain additional information respecting the extent of the penetration and control exercised by members of the Communist Party in the United States over an industry which is vital at all times to our defense, namely, communications.
>
> "In the event that testimony given during these hearings reflects a situation correctable by legislation or which may be remedied by legislation, the committee will recommend the appropriate measures at the proper time."

In response to questioning by a staff member of the committee, appellant testified that he had been a member of the Communist Party some years previously, and that

in his work for Western Union Telegraph he handled Government coded messages. He refused to name the person who had recruited him into the Party and refused to state whether he knew any communists presently in the industry. The exact questions forming the basis of the indictment are as follows:

Count One: "Was he [the person who recruited defendant in the Communist Party] a communications worker?"

Count Two: "We should like to have you tell us now whether or not there are any persons engaged at Western Union who at any time have been known by you to be Communists."

Count Three: "Were any of the officers of your union members of the Communist Party at the time you were a member of the Communist Party?"

Count Four: "Were any of the present officers of your union members of the Communist Party at the time you were in the Party?"

When appellant declined to answer these questions,[1] referring to the statement of objections filed by Grumman, the pertinency of the questions was explained to him as follows:

> "Mr. Arens [Counsel for Committee]: Mr. Chairman, I respectfully suggest that I be permitted to explain to the witness why it is pertinent to this inquiry for us to insist that this witness tell us whether or not the person who recruited him into the Communist Party was at that time in the communications field as a communications worker.
>
> "Now, Mr. Witness, this committee is considering legislation to safeguard this Nation from possible espionage or sabotage facilities by Communists.
>
> "If the person who enlisted you into the Communist party was engaged in the communications field, that person undoubtedly would have some informa-

[1]Appellant, like Grumman, did not urge the Fifth Amendment.

> tion which would be of use to this committee in developing facts respecting Communist penetration of the communications facilities of this country.
>
> • • •
>
> "If you do have such information and if we can get the names of those people and if we can get them to testify, we will have information which will form a solid foundation upon which this committee can recommend legislation to the Congress, to protect the security of this Nation."

The pertinency of the specific questions forming Counts Three and Four of the indictment was explained to appellant by Mr. Gordon H. Scherer, a committee member, as follows:

> "[T]hose questions were asked you for the same reasons that Mr. Arens, our counsel, gave you for asking the other questions. They are pertinent for the same reasons that he advanced."

At the trial in the District Court, Count Two of the indictment was dismissed on motion of appellant. He was convicted on the remaining three counts and was duly sentenced. This appeal followed.

Richard Arens, the committee counsel, testified at the trial that appellant was called to testify before the committee on the following basis: (1) his name appeared on a list given the committee by Western Union Telegraph of its employees who, in their work, had access to Government coded messages; (2) the committee files listed appellant as a member of the American Communications Association [as stated in Grumman, testimony before the committee had identified certain officers of that Association as communists]; and (3) a New York Times article published in 1940 contained an account of union litigation in which it was alleged that appellant was a "Red."

We have already decided, in *Grumman*, that the subcommittee's investigation of the subject was authorized by Congress; that the subcommittee was pursuing a valid

legislative purpose in conducting this investigation; and that the subcommittee's interrogation in the course of its investigation in the communications field did not violate First Amendment rights of free association and free speech.

We think the questions asked appellant were clearly pertinent to the subject matter under investigation. It is difficult to imagine questions more pertinent to an effort to discover the identity of persons possessing the very information the committee sought. We think, too, that the explanation of pertinency given appellant made that pertinency clear beyond any doubt. In such circumstances, appellant's refusal to answer amounted to a refusal to identify to the committee persons who might possess up-to-date knowledge of the details and extent of communist conspiracy in the industry under investigation, and a refusal, in effect, to state even whether or not such a conspiracy existed.

Appellant further complains of the exclusion by the trial court of his proffered expert testimony on the question of "balancing" the interest of the Government in eliciting the testimony sought against the First Amendment rights asserted by the witness. This "balancing" is strictly a matter of law for decision by the court and, therefore, "expert" testimony is irrelevant.

Appellant seeks to distinguish this case from *Wilkinson* v. *United States*, 365 U. S. 399 (1961), and *Braden* v. *United States*, 365 U. S. 431 (1961), on the ground that the committee lacked probable cause for calling him inasmuch as he was not identified by prior witnesses as a communist. Calling him in such circumstances, he contends, amounts to an "indiscriminate dragnet procedure." See *Barenblatt* v. *United States*, 360 U. S. 109, 134 (1960).

We know of no requirement that a prospective witness actually be named as a communist by a prior witness before he may legally be called by a congressional investigating committee. Certainly the committee had probable cause to inquire whether appellant was a communist. His affirmative answer to the questioning as to party membership

in and of itself was sufficient to induce the committee to seek from him the information it wanted. This, we think, is what the Supreme Court meant, in *Wilkinson*, when it said: "Indeed, it is difficult to imagine a preliminary question more pertinent to the topics under investigation than whether petitioner was in fact a member of the Communist Party."

In accordance with our action in delaying decision in *Grumman*, we delayed decision in this case, which, like *Grumman*, is readily distinguishable from *Deutch* v. *United States*, decided June 12, 1961. As in *Grumman*, the questions asked of appellant here were clearly pertinent to the subject under inquiry and in no way represented an excursion beyond the announced purpose and scope of the committee's inquiry.

We have examined the other contentions of appellant and find no error.

*Affirmed*

BAZELON, *Circuit Judge*, concurring in the result: Two principal grounds of error are raised on this appeal: (1) that the questions which appellant refused to answer, relating to the names of other persons associated with him in political activity, were not pertinent to the congressional inquiry; and (2) that there was no showing of probable cause sufficient to justify the issuance of a subpoena to appellant. I agree that the first contention must be rejected if we are to consider the question of pertinency to be resolved without reference to First Amendment rights. I also agree that the second contention must fail since we are bound by this court's decision in *Shelton* v. *United States*, 108 U. S. App. D. C. 153, 280 F. 2d 701 (1960), *cert. granted*, 365 U. S. 857 (1961).

## Appendix B

**(Judgment)**

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1960.
Criminal 753-58

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No. 15-779
BERNARD SILBER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Before:

MR. JUSTICE REED, retired, and BAZELON and BASTIAN, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

*Per* CIRCUIT JUDGE BASTIAN.

Dated: Jun. 30, 1961.

Separate opinion by CIRCUIT JUDGE BAZELON concurring in the result.